BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RONALD F. ZAMORANO Claimant	)	
VS.	)	
THE BOEING CO. - WICHITA Respondent	)	Docket No. 177,648
AND	)	
AETNA CASUALTY & SURETY CO. Insurance Carrier	)	
AND	)	
THE KANSAS WORKERS COMPENSATION FUND	)	

ORDER

Respondent and the Kansas Workers Compensation Fund appeal from an Award rendered March 8, 1994 by Administrative Law Judge Shannon S. Krysl.

APPEARANCES

The claimant appeared by and through his attorney, Thomas Hammond of Wichita, Kansas. The respondent and its insurance carrier appeared by and through their attorney, Eric Kuhn of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, J. Philip Davidson of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Respondent asks the Appeals Board to review the findings and conclusions of the Administrative Law Judge relating to the nature and extent of claimant's disability. The Workers Compensation Fund, in addition to the issue raised by respondent, seeks review of the Award entered by the Administrative Law Judge as to its liability. Accordingly, the issues presented for determination by the Appeals Board are the same as those set forth in the March 8, 1994 Award by Administrative Law Judge Shannon S. Krysl, as follows:

(1) Nature and extent of the resulting disability.
(2) Fund liability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) The Award of the Administrative Law Judge sets out her findings of fact and conclusions of law in some detail. It is not necessary to repeat those herein. Having reviewed the entire record, the Appeals Board finds that the findings of fact and conclusions of law as enumerated in the Award of the Administrative Law Judge regarding the issue of nature and extent of disability are accurate and appropriate, and we hereby adopt same as the findings and conclusions of the Appeals Board as if specifically set forth herein as to that issue.

The Appeals Board likewise finds that the claimant has proven a work disability. Although claimant continued to work for respondent following his onset of symptoms and, in addition, was able to return to work for respondent in an accommodated position following surgery, he continued to have medical problems and symptomatology. His ability to perform limited work for a short period of time is not sufficient to give rise to the presumption of no work disability found in K.S.A. 1992 Supp. 44-510(e).

The Administrative Law Judge found claimant to possess a forty-two and three-fourths percent (42.75%) work disability based upon the testimony of vocational experts Jerry Hardin and Maurice Entwistle. Those opinions utilized the functional impairments found and physical restrictions recommended by the medical experts, including Dr. Mark Melhorn, Dr. Kenneth Zimmerman and Dr. Ernest Schlachter. In averaging the various opinions of the medical and vocational experts, the court considered loss of labor market and wage loss opinions that both took into consideration the claimant's prior back injury and resulting medical restrictions and those that did not. This could, under certain circumstances, be described as comparing apples to oranges; however, under the facts of this case the Appeals Board does not find the approach taken by the Administrative Law Judge to be inappropriate. There is evidence to suggest that the claimant's preexisting impairment gave rise to legitimate and appropriate medical restrictions having been placed upon him following his 1982 injury. However, those restrictions that were given to claimant by Dr. Schlachter were not considered when claimant was rehired by respondent in May of 1988. In fact, he underwent a preemployment physical examination at that time and was certified as having no permanent medical restrictions. Furthermore, there was no consideration given by respondent to any known physical restrictions in placing claimant in his position and claimant was able to successfully perform his job tasks, at least until the spring of 1992, without difficulty. On the other hand, it should be noted that claimant's job duties with respondent for the most part appear not to have been in violation of the restrictions recommended by Dr. Schlachter in 1982. It is therefore not possible to say with certainty whether those restrictions were or were not medically necessary by the time claimant went to work for respondent in 1988. Accordingly, one does not come away with a clear picture as to what extent, if any, claimant's ability to access the open labor market and to earn a comparable wage had been compromised or reduced by his preexisting injury and resulting disability.

There is competent and credible testimony in the record to support a conclusion that both prongs of the work disability test found in K.S.A. 1992 Supp. 44-510e(a) had been affected by the preexisting condition as well as evidence that they had not. Accordingly, the Appeals Board finds it appropriate to consider all the opinions expressed by the vocational experts.

The testimony of the vocational experts as to the extent that claimant's ability to perform work in the open labor market has been reduced, based upon the restrictions of the medical experts contained in the record, range from twenty-five to sixty percent (25-60%) without regard to the preexisting permanent restrictions imposed by Dr. Schlachter from the previous back injury, and from ten to fifty percent (10-50%) if those restrictions are utilized. As we have stated, our understanding of the formula utilized by the Administrative Law Judge in determining this prong of the claimant's work disability was to average all the various opinions.

The Court of Appeals of Kansas has set forth the law a fact finder is to follow when determining the nature and extent of disability in the often cited case of Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991) as follows:

> "The existence, nature, and extent of disability of an injured worker is a question of fact. Medical testimony is not essential to the establishment of these facts. Thus, . . . the factfinder, is free to consider all of the evidence and decide for itself the percentage of disability. The numbers testified to by the physicians are not absolutely controlling." Id. at Syl. ¶ 1.

The weight of the credible evidence, when taken as a whole, supports the combined, averaged labor market loss and wage loss for a forty-two and three-fourths percent (42.75%) disability.

Mr. Maurice Entwistle found an actual wage loss of thirty-nine percent (39%) based upon an assumption of an average weekly wage of $603.20 per week or $15.08 per hour preinjury and claimant's actual postinjury wage being $9.20 per hour. Mr. Jerry Hardin gave an opinion of a forty-five percent (45%) loss of claimant's ability to earn a comparable wage based upon a preinjury wage figure of $667.60 per week and a postinjury wage of $386.80 per week. Neither of these opinions take into consideration the value of claimant's fringe benefits which are a part of the claimant's stipulated average weekly wage of $846.88. In the absence of evidence concerning the value of fringe benefits claimant is earning or is capable of earning postinjury, the best evidence of claimant's postinjury wage-earning capacity is found to be the $9.22 per hour claimant testified he is earning doing photocopier repair for a school district. Although claimant did testify that he receives some benefits with his current employer including health insurance, the value of those benefits is not in evidence. Taking this hourly rate times forty (40) hours per week results in a gross average weekly wage of $368.80. When compared to his stipulated average weekly wage with respondent, the result is a fifty-six percent (56%) wage loss. As we noted previously, the claimant's actual wage loss would be something less than this taking into consideration the value of his present fringe benefits but a figure cannot be ascertained due to the absence of the value of those fringe benefits in the record. Comparing only the hourly wage rates of $16.69 with respondent to the $9.22 an hour claimant testified he earns with the school district, reflects a forty-five percent (45%) loss. Thus, we conclude claimant's actual wage loss lies somewhere between forty-five (45) and fifty-six percent (56%).

Accordingly, the record reflects that claimant has sustained a loss of ability to access the open labor market between ten and sixty-five percent (10-65%) and a loss of ability to earn a comparable wage of between forty-five and fifty-six percent (45-56%). The finding of a thirty-eight percent (38%) labor market loss and a forty-seven and one-half percent (47.5%) wage loss for a forty-two and three-fourths percent (42.75%) work disability by the Administrative Law Judge is within this range. The Appeals Board finds it is a reasonable and appropriate reflection of claimant's work disability based upon the record presented and the Appeals Board adopts this finding by the Administrative Law Judge as its own. The weight of the credible evidence, when taken as a whole, supports the combined labor market loss and wage loss for a forty-two and three-fourths (42.75%) work disability. See Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990); Schad v. Hearthstone Nursing Center, 16 Kan. App. 2d 50, 816 P.2d 409, rev. denied 250 Kan. 806 (1991).

(2) We next address the issue of what is the liability of the Kansas Workers Compensation Fund, if any. The testimony and medical evidence establishes that claimant initially developed a right wrist tenosynovitis condition in April through July of 1992. Surgery was performed by Dr. James Gluck for this condition July 8, 1992. Claimant was released to return to work with restrictions; although, the evidence suggests that the claimant returned to his same department and performed the same job with some accommodation, specifically the use of a vibratory glove and limited use of vibratory tools.

Claimant subsequently developed an increase in symptomatology in his right wrist and forearm area and developed new symptoms in his left hand. Claimant was referred

to Dr. J. Mark Melhorn who diagnosed bilateral carpal tunnel syndrome. Carpal tunnel release surgery was performed on October 28, 1992 on the right and a carpal tunnel and ulnar nerve release surgery was performed December 9, 1992 on the left.

Dr. Ernest Schlachter testified claimant would not have developed the carpal tunnel condition on his right upper extremity and the resulting impairment but for the preexisting tenosynovitis condition in the right wrist. Dr. Schlachter was further of the opinion that claimant would not have sustained the carpal tunnel and ulnar nerve injury to his left upper extremity but for the fact that claimant was utilizing his left arm more to compensate for the injuries already present in his right upper extremity. Dr. Kenneth Zimmerman testified that he agreed with Dr. Schlachter's opinions in this regard.

K.S.A. 1992 Supp. 44-567 allows an employer who has knowingly hired or retained a handicapped employee to shift liability for compensation to the Fund under certain circumstances. There is no argument by the parties in this case but that claimant was a handicapped worker within the meaning of the statute when he returned to work following his tenosynovitis surgery by Dr. Gluck in July 1992. The Kansas Workers Compensation Fund appeals the Award by the Administrative Law Judge finding it liable for two-thirds (⅔) of the Award, contending instead that a fifty percent (50%) apportionment of liability would be more appropriate based upon the testimony of Dr. Melhorn. Respondent, on the other hand, argues that based upon the testimony of Dr. Schlachter and Dr. Zimmerman, it should only be found liable for a scheduled injury to claimant's right wrist due to the tenosynovitis condition, as claimant's subsequent bilateral carpal tunnel and ulnar nerve condition, and any work disability associated with that bilateral condition, is the result of aggravations claimant suffered following his return to work for respondent and a direct result of his preexisting work-related injury, i.e. the tenosynovitis condition. Accordingly, all liability for the subsequent bilateral condition and the entire work disability should be assessed against the Workers Compensation Fund, less the value of the scheduled injury to claimant's right wrist due to the tenosynovitis condition. The Appeals Board agrees with the analysis and argument of the respondent in this regard.

K.S.A. 1992 Supp. 44-567(a) addresses the issue of apportionment of liability between a respondent and the Kansas Workers Compensation Fund and provides as follows:

> "(1) Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund.
> "(2) Subject to the other provisions of the workers compensation act, whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director finds the injury probably or most likely would have been sustained or suffered without regard to the employee's preexisting physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, the director shall determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of award which is attributable to the employee's preexisting physical or mental impairment, and the amount so found shall be paid from the workers' compensation fund."

The Appeals Board agrees with the position of respondent and finds it has proven in the record that it is more probably true than not true that claimant's continuing problems stem from the initial overuse injury to the right wrist and that his return to work after the initial tenosynovitis surgery resulted in his bilateral upper extremity problems and the resulting work disability. Therefore, the finding by the Administrative Law Judge that the Kansas Workers Compensation Fund is liable for two-thirds (⅔) of the award and that the respondent and its insurance carrier should bear liability for one-third (⅓) of the work

disability is modified. The respondent and its insurance carrier shall be liable for a ten percent (10%) functional impairment to the right upper extremity only, utilizing the functional impairment rating to the right upper extremity given by Dr. Schlachter for the tenosynovitis condition alone, separate and apart from the subsequent carpal tunnel syndrome. The Kansas Workers Compensation Fund is liable for the remaining cost of the work disability award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the March 8, 1994 Award of Administrative Law Judge Shannon S. Krysl for a forty-two and three-fourths percent (42¾%) permanent partial general body disability should be, and is hereby, affirmed, but that the Award apportioning liability as between the respondent and its insurance carrier and the Kansas Workers Compensation Fund should be modified to reflect and limit respondent's liability to the value of a ten percent (10%) scheduled injury to the right arm with the remaining liability for permanent partial general body work disability being the responsibility of the Kansas Workers Compensation Fund.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Ronald Zamorano, and against the respondent, Boeing Military Airplanes, and the insurance carrier, Aetna Casualty & Surety Company, and the Kansas Workers Compensation Fund for accidental injuries sustained in April through July and August through October 1992. The date of July 7, 1992 will be used as the date of accident for purposes of computation of the award.

The claimant is entitled to 11.71 weeks temporary total disability at the rate of $299.00 per week, or $3,501.29, followed by compensation at the rate of $241.37 per week, not to exceed $100,000.00 for a 42.75% permanent partial general body disability. Respondent shall be responsible and liable for the value of a 10% permanent partial disability to the arm or $6,279.00, with the Kansas Workers Compensation Fund being liable for the remainder of the permanent partial disability award.

As of September 26, 1995, there would be due and owing to claimant 11.71 weeks temporary total compensation at $299.00 per week in the sum of $3,501.29, plus 156.29 weeks permanent partial compensation at $241.37 per week in the sum of $37,723.72 for a total due and owing of $41,225.01 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of the $100,000.00 shall be paid at $241.37 per week until fully paid or until further order of the Director.

Respondent will pay all medical and temporary total disability compensation up through and including August 3, 1992, the date of claimant's release and return to work following tenosynovitis surgery by Dr. Gluck. All medical expenses incurred and temporary total disability compensation payable after August 3, 1992 shall be the responsibility of and paid by the Kansas Workers Compensation Fund.

The claimant is entitled to unauthorized medical up to the statutory maximum.

Future medical benefits will be awarded only upon proper application to and approval by the Director of the Division of Workers Compensation.

The claimant's attorney fees are approved subject to the provisions of K.S.A. 1992 Supp. 44-536.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed one-third (⅓) against the respondent and insurance carrier and two-thirds (⅔) against the Kansas Workers Compensation Fund to be paid direct as follows:

Barber & Associates

Transcript of regular hearing	$265.35
Kelley, York & Associates, Ltd.	
Deposition of Ernest R. Schlachter, M.D.	$171.10
Deposition of Jerry D. Hardin	$377.40
Don K. Smith & Associates	
Deposition of Maurice Entwistle	$300.75
Deposition of Kenneth Dale Zimmerman, M.D.	$313.50
Deposition of J. Mark Melhorn, M.D.	$198.00

IT IS SO ORDERED.

Dated this ____ day of September 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas Hammond, Wichita, KS
Eric K. Kuhn, Wichita, KS
Philip Davidson, Wichita, KS
Shannon S. Krysl, Administrative Law Judge
J. Philip S. Harness, Director